No. 2672

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EXAMINER PRINTING COMPANY (a corporation), and WILLIAM RANDOLPH HEARST,

Plaintiffs in Error,

vs.

TAGGART ASTON,

Defendant in Error.

SUPPLEMENTAL POINTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

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I.

THIS COURT IS BOUND BY THE DECISION IN DAVIS v. HEARST, 160 CAL. 141, HOLDING THAT PROOF OF GOOD REPUTATION OF A PLAINTIFF IN A LIBEL ACTION IS NOT ADMISSIBLE IN ADVANCE OF AN ATTACK.

1. It must be presumed by this court that the Supreme Court of California, in deciding *Davis v. Hearst,* had in mind Section 2053 of the Code of Civil Procedure of California, and that that statute entered into the decision of the case, although not mentioned in the opinion.

This court will presume that the Supreme Court of California has a knowledge of legal principles and of

the statutes of California quite apart from those called to its attention by parties litigant.

See *Cross v. Allen* (1891), 191 U. S. 528, 538 (cited Br. of Plffs. in Error, p. 43);

In re Floyd & Hayes (1915), 225 Fed. 262 (cited Br. of Plffs. in Error, p. 44).

2. If *Davis v. Hearst* be considered merely as the decision of the Supreme Court of California with reference to the admissibility of evidence in that state quite apart from any statute rule upon the subject, it is, nevertheless, binding upon this court.

In *Stewart v. Morris* (1898), 89 Fed. 290, it is said (p. 291):

> "That the federal courts sitting in a state will follow the decisions of the highest courts of the state concerning the rules of evidence has been more than once explicitly affirmed by the supreme court. In Ex parte Fisk, 113 U. S. 113, 5 Sup. Ct. 724, after quoting section 914 of the Revised Statutes, that court said: 'In addition to this, it has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the states prevail in those courts.' This is quoted and reaffirmed in Bucher v. Railroad Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, where, after stating other respects in which the local decisions, '*whether founded on statute or not,*' are treated as the law of the state by the federal courts, the court says: '*The principle also applies to the rules of evidence.*'"

In *Nashua Savings Bank v. Anglo-American L. M. & A. Co.* (1902), 189 U. S. 221, 47 L. ed. 782, it is said (p. 228):

> "The 'laws of the several states' with respect to evidence within the meaning of this section (Revised

Statutes, Sec. 721), apply, not only to the statutes but *to the decisions of their highest courts.*''

See also:

Bucher v. Cheshire R. Co. (1887), 125 U. S. 555, 582; 31 L. ed. 795, 798;

Ex parte Fisk (1884), 113 U. S. 713, 720; 28 L. ed. 1117, 1120.

In *Gormley v. Clark* (1889), 134 U. S. 338, 33 L. ed. 909, the court, speaking of the binding effect upon decisions of the state court, says (p. 348):

> ''* * * this is so where a course of those decisions, *whether founded on statutes or not,* have become rules of property within the state; *also in regard to rules of evidence in actions at law.*''

II.

THE DECISION IN DAVIS v. HEARST QUITE APART FROM ITS BINDING EFFECT UPON THIS COURT, IS "SUPPORTED BY A PRACTICAL UNANIMITY OF AUTHORITY".

1. The statement in *Davis v. Hearst* that the rule forbidding proof of plaintiff's good reputation in a libel action in advance of an attempt, is ''supported by a practical unanimity of authority'', is justified by the cases and the texts.

See:

5 Am. & Eng. Enc'y of Law (2nd ed.), 852;

18 Am. & Eng. Enc'y of Law (2nd ed.), 1102;

Newell on Slander and Libel (2nd ed.), 771.

ENGLAND:

Cornwall v. Richardson (1825), 1 Ryan & Moody 305. Action for libel. Evidence offered on the part of the plaintiff to prove "general good character of the plaintiff for honesty" was excluded. Lord Chief Justice Abbott held that such evidence was not admissible, and further, that "it made no difference whatever as to the admissibility of such evidence that there was a special justification."

UNITED STATES:

Wright v. Schroeder, 2 Curtis 548; 30 Fed. Cas. 692. Action for libel. In the opinion it is said:

> "The better rule is that the plaintiff must rest on the presumption of good character which the law makes, *until* EVIDENCE *touching it is offered by the defendant.*"

CALIFORNIA:

Davis v. Hearst, 160 Cal. 143. In this case two witnesses of the plaintiff over a *general objection* of the defendant, were allowed to testify that the plaintiff bore a good reputation for honesty and integrity in the community in which he lived. The libel on which the complaint was based charged the plaintiff with being a "grafter". The defendant appealed from the judgment, and for the admission of the evidence as for other reasons disclosed by the opinion the judgment was reversed. With respect to the reception of the evidence of good reputation the court said (p. 185):

> "The court allowed evidence upon the hearing of plaintiff's case in chief to the effect that he bore a good reputation. That affirmative evidence of good reputation in advance of any attack upon it by defendant is inadmis-

> sible, is supported by a practical unanimity of authority. * * * There is nothing in our decisions to lend support to the contrary view. * * * The rule of all the authorities is that the good reputation of the plaintiff is assumed, and that he can, and must, rest upon this until his reputation is attacked."

ILLINOIS:

Golden v. Gartleman (1911), 159 Ill. App. 338. Suit for alienation of affection. Evidence of defendant's good reputation was admitted over objection. Subsequently the evidence was stricken out and error was assigned to the ruling of the court striking out the evidence. The Court of Appeals, in affirming the judgment, said (p. 339):

> "Here the plaintiff offered no evidence tending to show that the character of the defendant for chastity was bad. In *civil cases where character is in issue,* the weight of authority is that evidence of good character should not be received *unless the reputation has been attacked by* GENERAL EVIDENCE *of bad character.*"

INDIANA:

McCabe v. Platter (1843), 6 Blackf. Reports 405. Action for slander. In the opinion it is said:

> "Had the general issue alone been pleaded the evidence would have been clearly inadmissible; and we are of the opinion that the mere fact that there is a plea of justification ought not to make any difference. We consider the law to be that the plaintiff in a case like the present cannot give evidence in support of his character *until the defendant has attempted* BY EVIDENCE *to impeach it.*"

Miles v. Vanhorn (1861), 17 Ind. 245. Action for slander. The pleas were (a) general denial, and (b) justification. From a judgment in favor of the plaintiff

the defendant appealed. *The judgment was reversed* upon the ground that the court had received evidence of the plaintiff's good reputation in advance of an attack. The court said (p. 249):

> "In civil cases the general rule is that evidence in support of the character of either party is inadmissible *until there has been an attempt by evidence to impeach it.*"

Iowa:

Mayo v. Sample (1865), 18 Iowa 306. Action for slander. The court excluded evidence of good reputation of the plaintiff and from a judgment in favor of the defendant the plaintiff appealed. The judgment was affirmed.

Michigan:

Hitchcock v. Moore (1888), 70 Mich. 112; 37 N. W. 914. Action for slander. During the cross-examination of the plaintiff he was asked certain specific questions with reference to his conduct. He thereupon called a witness to prove that his reputation was good. The evidence was excluded and from a judgment in favor of the defendant the plaintiff appealed. The judgment was affirmed, the appellate court holding that the evidence was properly excluded.

Kovacs v. Mayoras (1913), 175 Mich. 582; 141 N. W. 662. Action for libel. Judgment was rendered in favor of the plaintiff. The defendant appealed and the judgment was reversed, one of the grounds for the reversal being the reception of evidence of the plaintiff's good reputation in the absence of an attack thereon by the defendant.

Missouri:

Kennedy v. Holladay (1887), 25 Mo. App. 503. Action for malicious prosecution. The defendant appealed from a judgment in favor of the plaintiff. The judgment was reversed for the erroneous reception of evidence of the plaintiff's good reputation in advance of an attack thereon by the defendant.

New Hampshire:

Severance v. Hilton (1851), 24 N. H. 147. Action for slander. Judgment was rendered in favor of the defendant. The plaintiff appealed, alleging that the court committed error in refusing to admit evidence of the good reputation of the plaintiff. The judgment was affirmed, the court saying (p. 148):

> "Where the defendant has not attacked the plaintiff's general character *in evidence,* the plaintiff cannot introduce proof of his good character to rebut a justification, nor to rebut the plaintiff's proof that the words laid in the declaration were spoken by the defendant."

New York:

Shipman v. Burrows (1829), 1 Hall. 399. Action for slander. A new trial was granted the defendant for the erroneous reception of evidence of the plaintiff's good reputation in advance of an attack upon it. This is one of the leading cases upon the subject.

Houghtaling v. Kilderhouse (1848), 1 N. Y. 531. Action for slander. The pleas were (a) not guilty, and (b) justification. On the trial the defendant gave circumstantial evidence tending to show that the charge was true. Thereupon the plaintiff offered to introduce evidence to prove "that his general character was good".

This was objected to by the defendant and excluded. After judgment in favor of the defendant, plaintiff moved for a new trial, alleging error in the exclusion of the evidence. The Supreme Court denied a new trial and from the judgment plaintiff appealed to the Court of Appeals, where it was held without opinion that the evidence had been properly excluded.

OHIO:

Blakeslee v. Hughes (1893), 50 Ohio St. 490; 34 N. E. 793. Action for libel. The defense was justification. On the trial the court, over the defendant's objection, permitted the plaintiff to give in chief to the jury evidence of his good reputation. The Circuit Court, *solely on account of this ruling,* reversed the judgment and remanded the cause for a new trial. Held, on appeal to the Supreme Court, that the Circuit Court was right in reversing the case.

In the opinion it is said:

> "Contention is also made that, as the law only presumes an average character, the plaintiff should be permitted to establish, if he can, a character superior to that, in order to enhance the amount of his recovery. Claim is further made that the defendant in this class of cases is not injured by the plaintiff introducing evidence of his good character in chief, because it only tends to establish what the law would presume in the absence of the objectionable evidence. The force of this latter contention would be greatly increased if the evidence of good character actually introduced tended to establish a character of the same degree of excellence that the law would presume if no evidence should be given, and if it could be certainly known that the plaintiff's good character was no more forcibly presented to the minds of the jury by the favorable opinions of his neighbors, delivered

> under oath in their presence, than it would have been by a silent presumption of law. At best, the contention that the plaintiff in that class of actions should be allowed to establish by evidence a character superior to that presumed by law cannot be harmonized with the other claim, that there is no error in allowing it to go to the jury, because it only establishes what the law presumes. Without entering into any discussion of the principles involved in this question, we think the rule forbidding the introduction of such evidence in chief has prevailed in this state from an early period in its judicial history. The rule is plain, and of easy application, works no substantial injustice, and no sufficient reason has been adduced to justify its being overturned."

OREGON:

Cooper v. Phipps (1893), 24 Ore. 357; 33 Pac. 985. Action for libel. Judgment in favor of the plaintiff. The defendants appealed and judgment was reversed, on the ground that the trial court had erred in receiving evidence of the good character of the plaintiff previous to an attack thereon.

PENNSYLVANIA:

Chubb v. Gsell (1859), 34 Pa. 114. Action for slander. A judgment in favor of the plaintiff was reversed for the *sole* reason that the trial court had admitted evidence of the plaintiff's good reputation in advance of an attack by the defendant. In the opinion it is said:

> (p. 115) "In a certain sense, therefore, the character (reputation) of the plaintiff in every such action may be said to be put in issue. The plaintiff offers it to the attack of the defendant. The law presumes that it is good but the defendant may traverse this presumption. *Such a traverse is presented when the defendant offers* EVIDENCE *to show that it is bad.* But until then, a plaintiff is not at liberty to adduce evidence to show that his

character is good; for until it has been attacked, the law *presumes, and the defendant admits,* such to be the fact. Until then, the defendant has refused to accept the issue tendered. This is an almost universal rule, not only in this state, but in England, and in our sister states. * * * It is, therefore, only *where evidence has been given directly attacking the character of the plaintiff,* that he is at liberty to introduce proof of his good reputation. * * * Reason, and the authorities generally, unite in excluding such evidence, except where the defendant, by an attack upon it, has rebutted the presumption which the law raises in favor of a good reputation."

WASHINGTON:

Hall v. Elgin Dairy Co (1896), 15 Wash. 542; 46 Pac. 1049. Action for libel. The defendants pleaded justification. Judgment in favor of the defendant. The plaintiff appealed. The judgment was reversed for the reason, among others, that the court had improperly admitted evidence of the plaintiff's good reputation in advance of an attack.

2. *The jurisdictions admitting evidence of plaintiff's good reputation in advance of an attack, so far as can be ascertained, are limited to* North Carolina, South Carolina, Kentucky, Virginia Massachusetts and Connecticut.

See

5 Am. & Eng. Enc'y of Law (2nd ed.), 852,

where the jurisdictions for and against the rule are enumerated.

See also

8 Enc'y of Evidence 274, 275,

for the same purpose.

The cases in these jurisdictions, *six in number,* do not in anywise militate against the position of Mr. Justice Henshaw, that the contrary doctrine for which we contend is "supported by a practical unanimity of authority."

3. The cases of *Press Publishing Co. v. McDonald,* 63 Fed. 238, and *Morning Journal Ass'n v. Duke,* 128 Fed. 657, relied upon by defendant in error, are inapplicable.

Both of the cases just cited hold merely that the *social standing* of the plaintiff is admissible. It was because of the rule stated in these and similar cases that the plaintiff was permitted *without objection* to introduce evidence of his technical education and attainments and the various engineering projects with which he had been connected. This gave to the jury his engineering standing. It is quite another matter, however, to prove general good reputation. The distinction between the two is drawn in *Davis v. Hearst,* supra, where *Turner v. Hearst,* 115 Cal. 394, was distinguished, Mr. Justice Henshaw saying with respect thereto:

> "In Turner v. Hearst, 115 Cal. 394 (47 Pac. 129), no question of reputation was involved, nor was any evidence addressed to it. The court merely declared that in estimating general compensatory damages, the jury was entitled to know 'plaintiff's position and standing in society, and the nature and extent of his professional practice.' "

III.

EVEN THOUGH THERE WERE ANY INCONSISTENCY BETWEEN TURNER v. HEARST AND DAVIS v. HEARST (WHICH THERE IS NOT) THIS COURT WOULD BE BOUND TO FOLLOW THE LATTER BECAUSE IT IS THE LATEST PRONOUNCEMENT OF THE SUPREME COURT OF CALIFORNIA.

In *Leffingwell v. Warren* (1862), 2 Black. 599, it is said:

> "If the highest judicial tribunal of a state adopts new views as to the proper construction of such a statute and reverses its former decisions, *this court will follow the latest settled adjudication.*"

To the same effect see

Wade v. Travis Co. (1898), 174 U. S. 499.

To the same effect, see

Sioux Remedy Co. v. Cope (1914), 235 U. S. 197, 201; 59 L. ed. 193.

In re Floyd & Hayes (1915), 225 Fed. 262, it is said (p. 265):

> "It is the duty of the federal court to follow the latest decision of the state court although it may differ from prior decisions of the latter tribunal."

1. The cases relied upon by the defendant in error to the contrary of the proposition just discussed, are inapplicable.

(a) The case of *Burgess v. Segilman* (1882), 107 U. S. 20, is authority for the proposition that where there is *no* decision of the state specifically dealing with a proposition of law, the federal court may decide the question for itself. This case is followed by *Kuhn v.*

Fairmont Coal Co., 215 U. S. 349, also cited by defendant in error.

(b) *Gelpcke v. Dubuque,* 1 Wall. 175; *Ohio Life Ins. Co. v. Debolt,* 16 How. 416; and *Havemeyer v. Iowa Co.,* 3 Wall. 303, lay down the rule that where there is an inconsistency in the decisions of the state court the federal court is at liberty to follow either one. These cases, however, do not represent the general rule as shown by the cases upon which we rely, but rather an exception to that rule. They represent the rule that where contracts are made or bonds are issued in reliance upon decisions of a state court, a federal court in construing such contracts or bonds will follow the earlier decisions rather than the later decisions overruling them. The general rule, however, is that the latest pronouncement of the state court is controlling upon the federal court and finds expression in the dissenting opinion of Miller, judge, in *Gelpcke v. Dubuque,* supra.

IV.

THE DECISION OF THE SUPREME COURT IN CALIFORNIA IN DAVIS v. HEARST, WHETHER CONSIDERED AS THE CONSTRUCTION OF A STATE STATUTE OR AS A RULE OF EVIDENCE QUITE APART FROM STATUTE BEING BINDING UPON THE FEDERAL COURT, SO ALSO IS THE HOLDING THAT THE RECEPTION OF EVIDENCE OF GOOD REPUTATION IS REVERSIBLE ERROR.

The decision in *Davis v. Hearst* in holding that the reception of evidence of the plaintiff's good reputation was *reversible* error is as binding upon this court as

the rule there announced that the reception of such evidence is erroneous. The holding of a state court with respect to the consequences of the violation of a state statute with respect to a matter of evidence is as binding upon the federal court as is the construction of the statute itself. The same rule must necessarily apply even though *Davis v. Hearst* be not considered as a decision dealing with the construction of a state statute, but merely a decision on a matter of evidence quite apart from statute.

V.

THE EVIDENCE OF THE PLAINTIFF'S GOOD REPUTATION WAS NOT ADDRESSED TO HIS PROFESSIONAL STANDING. EVEN WERE IT SO ADDRESSED, HOWEVER, IT WOULD HAVE BEEN INADMISSIBLE.

1. The evidence dealt only with a personal qualification of the plaintiff.

See

Brief of Plaintiffs in Error, p. 52.

2. Even though the evidence of plaintiff's good reputation went to his standing in his profession it would, nevertheless, be inadmissible.

The rule that excludes evidence of reputation with respect to a *personal* qualification also extends to proof of reputation of a *professional qualification.*

See *Burkhart v. North American Co.,* 214 Pa. 39; 63 Atl. 410; and *Howland v. Blake Mfg. Co.,* 156 Mass. 543; 31 N. E. 656, cited in Brief of Plaintiffs in Error, pp. 61, 62.

VI.

THE GENERAL OBJECTION TO THE EVIDENCE OF PLAINTIFF'S GOOD REPUTATION WAS SUFFICIENT FOUNDATION FOR A VALID EXCEPTION.

1. The rule that a general objection is insufficient has limitations as well defined as the rule itself. The rule does not apply unless the general objection masked a secret objection which if made *might have been obviated by the other side.*

In *Noonan v. Caledonia Gold Mining Co.* (1886), 121 U. S. 393; 30 L. ed. 1061, the court, speaking through Mr. Justice Field announced the rule and the limitation with respect to a claim that a general objection was insufficient. The court said (p. 1063):

> "The rule is universal that where an objection is so general as not to indicate the specific grounds upon which it is made it is unavailing on appeal *unless it be of such a character that it could not have been obviated at the trial.* The authorities on this point are all one way. *Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to* GIVE THE OTHER SIDE FULL OPPORTUNITY TO OBVIATE THEM AT THE TIME, *if under any circumstances that can be done.*"

The court in the foregoing matter was dealing with a general objection to the introduction of articles of incorporation. The specific objection which was veiled in the general objection was that the articles were not sufficiently authenticated. Speaking of the objection the court said:

> "Had it been taken at the trial and deemed tenable it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates to the articles of incorporation."

See, also

Nightingale v. Scannell (1861), 18 Cal. 315;
Brumley v. Flint (1891), 87 Cal. 471;
People v. Gordon (1893), 99 Cal. 227;
Swan v. Thompson (1899), 124 Cal. 193;
Arnold v. Producers' Fruit Co. (1900), 128 Cal. 637;
Morehouse v. Morehouse (1903), 140 Cal. 88.

In *Roche v. Llewellyn Iron Works Co.* (1903), 140 Cal. 563, it is said (p. 577):

> "It is urged that the general objection of 'incompetency, immateriality, and irrelevancy' was not sufficiently specific, and several decisions of this court are cited in support of this claim. These cases, however, go only to the extent of holding that under this objection, a party cannot upon appeal urge an objection which is merely formal or special, and which, if it had been pointed out when the evidence was offered, might have been obviated. (See Colton L. and W. Co. v. Swartz, 99 Cal. 278.) Where the offered evidence is inadmissible for any purpose the general objection is sufficient."

See also

Short v. Frink (1907), 151 Cal. 83.

In *Hayne on New Trial and Appeal,* the author, after discussing the rule that an objection should be specific, goes on to say, in paragraph 105, pages 513 et seq.:

> "But it is not to be inferred from the language of the above-quoted decisions that a general objection is in no case of any validity. *The reason of the rule that objections must be specific is that the party might have obviated them had his attention been called to them at the trial. If the objection could not have been obviated, it is evident that the reason of the rule does not apply, and the reason ceasing, the rule itself ceases.*" (Citing numerous cases.)

2. The evidence of plaintiff's good reputation was inadmissible for any purpose and the defect could not have been obviated in any manner.

Nothing that the plaintiff could have done could have made evidence of plaintiff's good reputation admissible, therefore, a general objection was sufficient.

See cases cited supra.

(a) An amendment to the complaint could not, as suggested upon the argument, have made evidence of plaintiff's good reputation admissible.

Two propositions are made in our brief: (1) that *under the pleadings* the plaintiff was not entitled to prove damage *in his profession;* (2) that in no event was he entitled to prove evidence of *good reputation,* professionally or personal.

An amendment of the complaint might have brought within the issues in the action a claim of damage to the plaintiff *in his profession* and made admissible evidence of damage to the plaintiff's profession. It would not, however, have made evidence of the plaintiff's *professional* REPUTATION admissible. In an action for a libel directed at the plaintiff personally he is entitled to prove *personal damages* but is not entitled to prove *good personal reputation.* So, likewise, even though the libel be aimed at the plaintiff in a *professional* capacity the plaintiff while having the right to prove damages to his profession is not entitled to prove *good professional reputation.*

See cases cited under Point V, supra.

(3) In *Davis v. Hearst* it was argued by the respondent that a general objection was insufficient to invoke the rule that evidence of good reputation was not admissible in a libel action in advance of an attack. The court having by necessary implication held that the objection was sufficient, when it held that the evidence was inadmissible, such holding is binding upon this court.

The question of the sufficiency of a *general* objection was fully briefed and argued in *Davis v. Hearst.* The court held that the evidence was inadmissible, thereby by necessary implication holding that the objection was sufficient. We submit that the holding in *Davis v. Hearst* that a *general* objection is sufficient to invoke the protection of a rule of evidence is as binding upon this court as is the rule of evidence itself announced in *Davis v. Hearst.*

VII.

CONCLUSION.

For the reasons above set forth as well as for the many reasons contained in our brief, we submit that the judgment should be reversed.

Dated, San Francisco,
March 22, 1916.

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